BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19

ALLVEST WORK RELEASE, L.L.C.,

Employer

and Case 19-RC-14203

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
WOODWORKERS DISTRICT LODGE 1,
LOCAL LODGE 536, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[1] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved jointly claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate Unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time maintenance employees and cooks (including the head cook) employed by the Employer at its Longview, Washington, facility; but excluding managerial employees, directors, casual on-call employees, guards (including program monitors) and supervisors as defined by the Act.

[1] The parties filed briefs, which have been considered.

The Employer, a State of Washington corporation, contracts with the State of Washington Department of Corrections to operate what are in essence halfway houses for Washington State inmates in the State's work release program; generally those inmates are in their last 6 months of their sentences. The Petitioner seeks a unit of approximately 9 to 11 program monitors("PM's"),[2] one maintenance employee, and three cooks employed by the Employer at its Longview, Washington, facility; the only facility involved herein. The Employer contends that the program monitors are guards and thus are inappropriate for inclusion in a unit with non-guards, and inappropriate for representation by the Petitioner as the Petitioner cannot be certified to represent guards, since it already represents non-guards[3]. The Employer also contends that the lead cook is a statutory supervisor and should therefore be excluded from the Unit.

The Employer provides services, performs duties, and furnishes supplies, personnel, and equipment necessary for the care and custody of offenders or inmates placed in its Longview facility, as part of its contract with the State Department of Corrections. The Longview facility has accommodations for a maximum of 60 inmates and is generally at 90 to 95 percent capacity. Two inmates are assigned to each of the living quarters. Male and female inmates are assigned to different halls within the facility. There is a facility station at the main entrance, where PMs are stationed. In the back of the building, separate from the living quarters are the offices of the facility director, Marjory Roe; the program monitor supervisor (PMS), Maryann Fullman; the Community Corrections Officers (CCOs) and the State supervisor.[4] There is also a separate kitchen area where the three cooks work. The doors and windows visible to the facility station are not alarmed. However, those doors and windows not within sight are generally either inaccessible to the inmates or alarmed. There are eight cameras placed throughout the facility to enable the program monitors to monitor those areas not easily visible from the station.

On November 1, 2001, Washington State enacted a new requirement for operation of work release programs, mandating American Corrections Association accreditation. Part of the Employer's contract with the State is that it obtain ACA accreditation.

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[2] There are a number of "on-call" program monitors. The parties stipulated that in the event the program monitors are included in the unit, those "on-call" program monitors that have worked 15 hours during the last 20 week period prior to the filing of the petition will be eligible to vote.

[3] Section 9(b)(3) of the Act.

[4] The director is excluded from the unit and the parties stipulate that the PMS is a statutory supervisor. The CCOs and the State supervisor are State employees. The CCOs and State supervisor are responsible for all case management issues, serving legal documents, approval of sponsors, visitors, job approval and on-site checks, arrests and transport of offenders, approval of passes and schedules, approval to pick/cash paychecks, file maintenance, chairing committees, contraband storage and disposal, incident reports, emergency transport of offenders, case work with family and employer, and other stake holders, mail inspection, polygraphs, treatment plans follow-up, required reports, trust fund budget and OBTS (the State computer system).

Guard Issue

The Employer employs about 9 to 11 PMs.[5] The Employer contends that its program monitors are statutory guards because they are employed to do security work, such as watching over inmates and safeguarding the facility's premises.

At least two PMs are on duty at any one time, 24 hours a day, seven days a week. There are three shifts a day. Program monitors monitor ingress and egress at the facility. In that regard, visitors requesting to visit an inmate must first obtain prior approval. When a prospective visitor makes his or her request for a first visit with a resident inmate, a PM provides an application to the prospective visitor, who fills it out. A program monitor will then set up an appointment to interview the applicant. After the interview, a PM will then submit the application, along with the PM's completed interview form, to a state employee, who would then approve or disapprove the visits.

A list of an inmate's approved visitors is kept in the inmate's file, which is checked by a PM when a visitor comes for a visit. Program monitors maintain logs of these visits and search packages visitors bring into the facility. Mail packages are searched by the CCOs. Program monitors also have the authority to pat search or, with cause, strip-search, both visitors and inmates for contraband, although it appears that searches of *visitors* are quite rare. The record is unclear as to whether PMs would search packages fellow employees bring into the building. Dick Hooper, the Employer's director of correctional operations, testified without contradiction that PM are responsible for reporting employee violations by employees of the Employer's standards of conduct regarding the introduction of contraband, sexual harassment, sexual misconduct and drug and alcohol use on the job.

Program monitors perform four rounds of the facility each shift to verify the presence of those inmates identified as present and check locks on exterior doors. They also search common areas once a week and perform random room searches for contraband. Program monitors have keys to inmates' rooms to conduct room searches and head counts.

Program monitors also check passes that the CCOs issue to inmates. These passes permit an inmate to leave the premises for specified time periods to search for work, visit a doctor, or other approved activities. The PMs place calls to the various identified destinations to determine whether inmates actually show up. If an inmate returns five or more minutes late, a program monitor would perform a mandatory pat search, urine analysis ("UA") and Breathalyzer test on the inmate. Program monitors perform 95 percent of the UAs and Breathalyzer tests at the facility.

If a disturbance occurs in the facility, the PMs report it. If an inmate creates the disturbance or attempts to escape, PMs are not to physically intervene without CCOs'

[5] The employees at issue are actually classified as program monitor I or program monitor II. Although the program monitor IIs are also referred to as shift supervisors, the duties of the program monitor IIs appears to be the same as that of the program monitor Is, with the addition of preparing shift reports. Since the difference in the job descriptions is not relevant to the issue of whether these employees are guards within the meaning of the Act, I will refer to both classifications as "program monitors."

presence, but to notify the appropriate authorities. If the CCOs are present, part of the PMs' duties is to assist them in arrests. It appears that a PM's assistance is rarely required, but such assistance has occurred. Dennis Norvell, a PM testified that about one and one half years ago, he assisted a CCO in arresting an inmate. In that incident, he handcuffed an inmate that had modified his release ("pass"), stopped at a residence and threatened someone.

Because of their responsibility to assist in arrests, program monitors are required to take courses at the State's Correctional Officers Academy or the Work Release Academy. The Correctional Officers Academy is a four-week program offering training in, among other things, proper techniques in handcuffing, arrests, searches, seizures, and how to properly disarm someone. The Work Release Academy condenses the Correctional Officers Academy courses into a two-week program. The program monitors are also required to take a minimum of 20 hours of retraining annually, eight of which are in proper arrest, search and seizure techniques.

Section 9(b)(3) of the Act defines a "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employers or to protect the safety of persons on the employer's premises…." Employees are guards if a significant part of their job is the performance of guard duties, as opposed to being merely incidental to their primary function. See *Arcus Data Security Systems*, 324 NLRB 496 (1997); *Rhode Island Hospital*, 313 NLRB 343 (1993).

In that regard, the Board found employees at a work release center to be guards where they ensured that no unauthorized visitors entered the facility; searched all visitors and inmates entering the facility for contraband; searched packages entering the facility; monitored surveillance cameras; counted inmates; reported damage to the facility or to the employer's property; and were instructed to notify their supervisors in the event of a disturbance caused by the inmates. Here, the PMs have these same duties. See *Crossroads Community Correctional Center*, 308 NLRB 558 (1992).

Where the Board has found employees in similar contexts not to be guards, their guard-like functions were incidental to their primary non-guard functions. See e.g., *George Junior Republic*, 224 NLRB 1581 (1976)(guard-like duties of preventing unauthorized individuals from entering juvenile detention housing and insuring residents do not leave the premises incidental to "dorm supervisor" duties) See also *Ford Motor Co.,* 116 NLRB 1995 (1956)(receptionist not a guard); *55 Liberty Owners Corp.*, 318 NLRB 308 (1995)(doorpersons not guards).

Here, the Employer has given guard duties and responsibilities to its PMs, and they are specifically charged with enforcing the Employer's rules against employees and nonemployees alike. Moreover, they are responsible for protecting the Employer's property and the safety of persons on its property, as they regularly check the premises, perform head counts of inmates, verify inmate and visitor passes and conduct searches for contraband. In addition, they assist in arrests of inmates and are trained in arrest, search, seizure and handcuffing techniques. These functions are clearly more akin to those found to be primary guard duties in *Crossroads* than to those in *George Junior*

Republic, Ford Motor Co., and *55 Liberty Owners Corp.* [6] Thus, although the program monitors do not carry guns or wear a uniform or badge, their guard responsibilities are not a minor or incidental part of their overall responsibilities. See *Rhode Island Hospital*, *supra*.

Petitioner contends that the PMs' guard-like duties are incidental to their primary duty of counseling and monitoring the day-to-day activities of the residents and keeping up the required paperwork. In that regard, Petitioner asserts that program monitors' primary duties consist of assisting residents with directions to and from various places and assisting them in managing money and banking needs, as well as other services that may be required in helping the residents to adjust. I disagree.

The program monitors' guard duties—monitoring building ingress and egress; searching packages and performing pat searches, UA and breathalyzer tests; assisting in arrests, etc.—can hardly be said to be incidental to giving directions or assisting residents in managing money; they are the core of PM duties. It may be true that the PMs help residents to adjust, as the Petitioner contends, but the evidence does not establish such help is the primary function of their jobs. The evidence merely shows that one PM on his own initiative teaches a course on credit. Additionally, the Employer is in the process of establishing a new program--just announced—that would have PM's record inmate answers to a list of questions, such as "What do [you] intend to do when [you] get out?" and "What can [we] do to help that happen?" Such duties do not reflect the primary duties performed by the Employer's program monitors, especially where the vast majority of such "case management" type duties are performed by the CCOs.

Accordingly, I find the program monitors guards as defined by section 9(b)(3) of the Act and shall exclude them from the Unit.

Supervisory status

The Employer also employs a lead cook, one full-time cook and one part-time cook. The Employer contends that the lead cook is a statutory supervisor.

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of

[6] Although the Petitioner contends that *Crossroads* is distinguishable, I find that the factors relied on by the Petitioner to distinguish that case - such as more employees, the Employer was accredited, visitors and employees were searched regularly - do not warrant a different result.

independent judgment. *NLRB v. Kentucky River Community Care Inc.*, 121 S.Ct. 1861 (2001). Further, the burden of proving supervisory status is on the party alleging that such status exists. Id. Any lack of evidence in the record is construed against the party asserting supervisory status. *Freeman Decorating Co.,* 330 NLRB 1143 (2000).

The Employer contends that the lead cook is a statutory supervisor in that her job description states that her key responsibility with respect to personnel is to "recruit, hire, and oversee the training of staff, to evaluate and take corrective action; to set and review yearly goals for promotion of a positive atmosphere; to assign areas of responsibility and prepare schedules…" However, the issuance of "paper authority" which is not exercised does not establish supervisory status. *East Village Nursing & Rehabilitation Center v*. NLRB, 165 F.3d 960 (D.C. Cir. 1999). Based on the following, I find that the Employer has not so established that the lead cook is a supervisor within the meaning of Section 2(11) of the Act.

The employer contends that the lead cook has statutory authority to evaluate employees. The record shows that the Employer's program monitor supervisor furnishes evaluation forms to the lead cook to complete for the two cooks. She completes the evaluations and rates the cooks on such factors as performance of duties, relations with others, professional qualities, dependability, judgment/decisions, and communication skills. However, the lead cook testified that the evaluations are not related to any pay raise and she is not sure what purpose they serve. I note that section 2(11) does not include "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

A similar conclusion is warranted with respect to the Employer's contention that the lead cook has statutory authority to schedule work hours. The lead cook states that she schedules the cooks, but provides no details as to how she performs this duty and there is no record evidence that establishes what procedures she uses in setting the cooks' schedules. The lead cook states that she cannot schedule overtime since her "boss" will not allow overtime. There is no evidence that she calls in a cook when needed. The record does contain the schedule for the cooks for the month of January of 2002. However, the schedule merely indicates that the lead cook scheduled both herself and the other full-time cook to work weekdays and the part-time cook to work the weekends. There is nothing in the record to indicate that the lead cook's scheduling function is anything more than routine since her scheduling options appear to be limited by the full or part-time status of the cooks. In such circumstances, I find the lead cook's scheduling authority is limited by factors beyond her control. As such, her decision-making in making out the schedule is not "independent". Alternatively, that decision-making does not rise above the minimum threshold of "routine or clerical in nature." *Dynamic Science, Inc.*, 334 NLRB No. 56 (2001); cf. *Harborside Healthcare*, *supra*.

The Employer further contends that the lead cook has statutory supervisory authority in assigning and directing the cooks. The record evidence, however, fails to establish the requisite independent judgment and discretion in her assignments and direction. According to the lead cook, when asked whether she performs this function, she stated, "A little bit. Mostly, the people that work in the kitchen all know their job and they just do it." Furthermore, she states that the weekend cook works alone without supervision and if a problem came up, he would probably call the director or someone in

the building. Consequently, the degree of judgment exercised by the lead cook falls below the threshold required to establish statutory supervisory authority. See *Dynamic Science*.

The Employer also contends that the lead cook effectively recommends discipline and terminations. However, I find the record lacking in any evidence that would tend to establish such authority. Any termination is ultimately decided by the Employer's CEO, based on recommendations by the facility director. The lead cook testified that there was only one termination in her department and she wasn't sure whether she recommended termination for that individual. All she knew was that she told the facility director that the cook was not up to the job and the cook was ultimately fired. The CEO did not cover the termination in his testimony and the facility director did not testify; thus, the record is devoid of any evidence as to the considerations employed by the managers in their respective decisions and recommendations to terminate the cook. Did the cook make a recommendation to discharge, or merely report facts? *If* there was a recommendation, did her supervisors simply rely on her recommendation, or did they make their own independent investigations, such as calling in the individual for his story?

As for lesser forms of discipline, the Employer asserts that the lead cook can issue verbal and written warnings and recommend further action to the program monitor supervisor and the facility director. However, the only example of any discipline was that proffered by the lead cook. The lead cook states that she attempted to counsel a cook on her attitude without success. As a result, "I gave it to Marge [the facility director], because I couldn't do anything with her." The only further information presented is that the cook at some later point, quit. Thus, no clear connection of any kind is made between the counseling and any affect on employees' terms and conditions of employment. See *Ken-Crest Services,* 335 NLRB No. 63 (2001); *Nathan Katz Realty v.* NLRB, 251 F.3d 981, 989 (D.C. Cir. 2001)(informing decision maker that porter "wasn't doing a good job," is merely reporting and is insufficient to establish effective recommendation of discharge or discipline).

As for the Employer's contention that the lead cook effectively recommends hires, there is no specific example of anyone being hired. Without specific support for the contention, mere inference of supervisory authority cannot be sustained. *Sears, Roebuck & Co*., 304 NLRB 193 (1991). Here, the cook stated that she interviewed candidates for the cook position and made recommendations to the facility director. There is no evidence as to what her recommendations were. Did she simply report they "seemed nice", or that they had knife-handling skills? Or, did she state that she had interviewed them and recommended their hire. See, e.g., *Aardvark Post*, 331 NLRB No. 41 (2000). She further states that the facility director did not follow her recommendation once, but that "most of the time," she follows her recommendations. However, she also admits that there is not a lot of turnover. No evidence was submitted on how many hires she was involved. There was no testimony on the part of the hiring official as to what criteria factored into her decisions to hire or what weight the lead cook's recommendations had. Did the official simply adopt her recommendations, or, for example, conduct a follow-up interview, or contact references? I cannot on this record find the lead cook effectively recommends hires.[7]

[7] I note that the other factors the Employer contends establish statutory supervisory authority are secondary indicia of supervisory authority, the possession of which are not dispositive in the

For all the reasons set forth above, and based on the record as a whole, I conclude that Employer has not met *its* burden of establishing that the lead cook is a supervisor within the meaning of Section 2(11) of the Act.

There are 4 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote on those in the Unit employed during the payroll period ending immediately the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporally laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes International Association of Machinists & Aerospace Workers, Woodworkers District Lodge 1, Local Lodge 536, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before February 22nd, 2002**.** No extension of time to file this list may be granted except in extraordinary

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absence of evidence indicating the existence of any of the primary indicia of such status. *Billows Electric Supply*, 311 NLRB 878, fn. 2 (1993).

circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 1st, 2002.

DATED at Seattle, Washington, this 15th day of February 2002.

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